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6   UNITED STATES DISTRICT COURT

7   DISTRICT OF NEVADA

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9   SALESTRAQ AMERICA, LLC,   )
)
10   Plaintiff,   )   2:08-CV-01368-LRH-LRL
)
11 v.   )
)   ORDER
12 JOSEPH A. ZYSKOWSKI and   )
    DEVMARKETING, INC.,   )
13   )
                Defendants.   )
14 _____)

15   Before the court is Plaintiff SalesTraq America, LLC's ("SalesTraq") Motion for

16 Preliminary Injunction (#16[1]). Defendants Joseph Zyskowski and devMarketing, Inc.

17 ("devMarketing") filed an opposition (#17) to which SalesTraq replied (#21).

18 **I.   Facts**

19   **A. SalesTraq's Evidence**

20   SalesTraq is a business that provides information regarding Las Vegas-area residential

21 property on a fee-subscription basis. Before its formation, SalesTraq's current president, Larry

22 Murphy, accumulated a large number of floor plans and information sheets published by Las Vegas

23 builders. In the course of arranging these materials into a compilation, Murphy authored three sets

24 of numeric designators. These designators are searchable by computer algorithm and encapsulate

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            [1]Refers to the court's docket entry number

1   information concerning the attributes and location of each house plan in the compilation

2   ("Information Content"). The Information Content indicates the ages of houses, the number of

3   alternative floor plans available for a given house model, and the builder associated with a given

4   floor plan. On a typical page of SalesTraq's compilation, the Information Content appears in the

5   form of a "Details" box, which includes either a floor plan number or a model number, although

6   some pages include both numbers.

7   Since 1997, SalesTraq has provided its compilation to subscribers in two formats: its

8   website at salestraq.com and a CD-ROM or DVD. From August 2000 through August 2001,

9   Defendant Zyskowski held a six-month SalesTraq subscription and received multiple CD-ROMs or

10   DVDs. Zyskowski also held a six-month subscription to salestraq.com beginning September 20,

11   2007.

12   In late 2007, Murphy discovered devMLS.com, a website owned by Defendant

13   devMarketing. Murphy believes Defendants copied content from salestraq.com and placed that

14   content on devMLS.com. In particular, Murphy asserts that floor plans on devMLS.com contain

15   Information Content associated with the same floor plans on salestraq.com.

16   **B. Defendants' Evidence**

17   In 2007, Defendant Zyskowski decided to create a database for real estate agents in the Las

18   Vegas area. As part of this endeavor, Zyskowski and a computer technician entered information

19   concerning all active Las Vegas area new home developments. After developing the active listing

20   database, Zyskowski decided to create an archived listings database containing floor plans and

21   information about house models in closed developments. To obtain this information, Zyskowski

22   purchased access to SalesTraq's database and reviewed its archived files. If a floor plan was

23   included in an archived listing, Zyskowski used that floor plan and associated information to create

24   an archived listing in devMLS's database.

25   While reviewing SalesTraq's database, Zyskowski noticed floor plan numbers and model

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numbers appearing on floor plan drawings. Zyskowski believed that the numbers were created by

builders or developers to identify floor plans or models. He therefore indicated the floor plan

numbers and some model numbers in the archived section of devMLS.com. The floor plan

numbers and model numbers in devMLS.com's archived listings have no effect on the website's

search function and have no significance for a devMLS.com user. Rather, each listing in the

devMLS database is assigned a unique "devMLS number," and the archived listings are ordered by

square footage.

II.   Legal Standard

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear

showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council*, 129 S. Ct.

365, 376 (2008). To succeed, a plaintiff seeking a preliminary injunction must establish the

following: (1) a likelihood of success on the merits, (2) a likelihood of irreparable injury to the

plaintiff if injunctive relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4)

advancement of the public interest. *Id.* (citations omitted).[2]

III.   Discussion

SalesTraq seeks a preliminary injunction on the basis that it will likely succeed on its claims

for copyright infringement, breach of a nonexclusive license, and commercial appropriation. The

court now turns to each of these claims in turn.

A. Copyright Infringement

To establish a prima facie case of copyright infringement, a plaintiff must demonstrate the

following: "(1) ownership of the allegedly infringed material and (2) violation by the alleged

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[2]Prior to *Winter*, the Ninth Circuit also applied an alternative, "sliding-scale" test. The Court in *Winter* did not discuss the continued validity of the this sliding scale approach. However, in light of the *Winter* decision, the Ninth Circuit has indicated, "To the extent our cases have suggested a lesser standard, they are no longer controlling, or even viable." *Am. Trucking Associations v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009). Accordingly, this court will follow the Supreme Court and require Plaintiff to make a showing on all four of the preliminary injunction requirements.

1   infringer of at least one of the exclusive rights granted to copyright holders." *LGS Architects, Inc.*

2   *v. Concordia Homes*, 434 F.3d 1150, 1156 (9th Cir. 2006). The court concludes SalesTraq has

3   failed to show a likelihood of success on its copyright infringement claim. Specifically, SalesTraq

4   has not made an adequate showing under the second prong of a copyright infringement claim:

5   Defendants' violation of one of the exclusive rights granted to SalesTraq by a copyright in the

6   Information Content.

7   The court will assume for purposes of SalesTraq's motion that the Information Content is

8   copyrightable expression by its coordination or arrangement of facts concerning the location, age,

9   builder, alternative floor plans, and builder associated with each floor plan. *See Feist Publications,*

10 *Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 357-58 (1991) (stating that facts may be copyrightable

11 when they are selected, coordinated, or arranged in an original manner). SalesTraq has failed to

12 show, however, that Defendants copied SalesTraq's coordination or arrangement of these

13 underlying facts. *See id.* at 361 (stating that not all copying is copyright infringement); 4 Melville

14 B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.01[B] (2009) (stating that even if a

15 defendant copied a plaintiff's work, the question still remains whether the copying gives rise to

16 liability for infringement).

17   Defendants, of course, acknowledge that devMLS.com displays the Information Content in

18 the form of floor plan numbers or model numbers. Crucially, however, Defendants also present

19 uncontroverted evidence, that the numeric Information Content has no significance for a

20 devMLS.com user. (*See* Second Supplemental Decl. of Joseph A. Zyskowski (#18) ¶ 14.) Indeed,

21 it appears the Information Content serves only as a means for searching facts on SalesTraq's

22 database. (*See* Murphy Aff. (#16) Ex. 1 ¶ 6) ("The Information Content thus reduces into

23 numerical form, easily searchable via computer algorithm, several different types of information

24 that may be important to people searching the SalesTraq compilation . . . ."). Thus, while the

25 Information Content may serve as a designator for a creative arrangement or coordination of facts

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1   at salestraq.com, based on the present record, the court finds the Information Content is merely an

2   unprotected set of arbitrary numbers in the context of devMLS.com. *See e.g.*, *Toro Co. v. R&R*

3   *Products Co.*, 787 F.2d 1208, 1213 (8th Cir 1986) (holding that arbitrarily assigned part numbers

4   are not original expression). SalesTraq has therefore failed to show that Defendants' copied a

5   protectible element of SalesTraq's compilation. As such, SalesTraq has not demonstrated a

6   likelihood of success on the merits of its copyright infringement claim.

7   **B. Breach of an Implied License**

8   Turning now to SalesTraq's breach of an implied license claim, SalesTraq must prove (1)

9   the parties intended to contract, (2) the parties exchanged promises, and (3) Defendants promised

10 not to place SalesTraq's content on Defendant's website. *See Smith v. Recrion Corp.*, 541 P.2d

11 663, 665 (Nev. 1975). Here, although SalesTraq presents invoices indicating that Zyskowski

12 purchased multiple subscriptions to SalesTraq's services, the court is unable to discern how these

13 documents imply limitations on Defendants' use of SalesTraq's compilation. SalesTraq has

14 therefore failed to show a likelihood of success on its breach of an implied license claim.

15 **C. Commercial Misappropriation**

16 SalesTraq's evidentiary deficiency also extends to its commercial misappropriation claim.

17 Although Nevada has yet to recognize a claim for misappropriation of non-trade-secret

18 information, the court believes, if presented with the issue, the Nevada Supreme Court would

19 recognize such a claim. Nevada currently recognizes conversion and unjust enrichment, claims

20 closely related to commercial misappropriation. *See Mainor v. Nault*, 101 P.3d 308, 317 (Nev.

21 2004); *Evans v. Dean Witter Reynolds, Inc.*, 5 P.3d 1043, 1048 (Nev. 2000). Moreover, California,

22 which Nevada has followed when recognizing new commercial tort theories,[3] presently recognizes

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24 [3]*See U.S. Fidelity & Guar. Co. v. Peterson*, 540 P.2d 1070, 1071 (Nev. 1975) (looking to California

25 law as persuasive authority for establishing the implied covenant of good faith and fair dealing in the insurance
    context).

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1 a claim for misappropriation of non-trade-secret information. *See U.S. Golf Ass'n v. Arroyo*

2 *Software Corp.*, 81 Cal. Rptr. 2d 708, 714 (Ct. App. 1999).

3   The current record, however, does not demonstrate SalesTraq is likely to succeed on its

4 claim. A claim for commercial misappropriation consists of the following elements:

5   (a) the plaintiff invested substantial time, skill or money in developing its property; (b)
     the defendant appropriated and used the plaintiff's property at little or no cost to the
6   defendant; (c) the defendant's appropriation and use of the plaintiff's property was
     without the authorization or consent of the plaintiff; and (d) the plaintiff can establish
7   that it has been injured by the defendant's conduct.

8 *Id.* In support of contention that it will succeed on its commercial misappropriation claim,

9 SalesTraq briefly addresses the first three elements but fails to provide any evidence concerning the

10 fourth, that is, whether SalesTraq has been injured by Defendants' conduct. Rather, SalesTraq

11 avers only that "SalesTraq has been injured, to an extent that discovery will make more clear, by

12 Defendants' misappropriation, in that SalesTraq has lost potential and existing subscribers to

13 Defendants due to Defendants' misappropriation." (Mot. Prelim. Inj. (#16) at 12:6-8.)   This

14 assertion, however, without any evidentiary support is insufficient to meet SalesTraq's burden of

15 showing a likelihood of success on the merits. SalesTraq's motion for a preliminary injunction is

16 therefore denied.

17 **IV.   Conclusion**

18   SalesTraq's evidence is sufficient to show that it may ultimately succeed on the merits of

19 this action. Nevertheless, the present record falls short of the burden SalesTraq must meet to

20 warrant issuance of a preliminary injunction. While further discovery may provide the requisite

21 showing, the court cannot grant SalesTraq's motion based upon the current record.

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1   IT IS THEREFORE ORDERED that SalesTraq's Motion for Preliminary Injunction (#16)

2   is DENIED.

3   IT IS SO ORDERED.

4   DATED this 10th day of June, 2009.

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7   LARRY R. HICKS
                                               UNITED STATES DISTRICT JUDGE

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